SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-78

MEL KAHN, etc.,

Appellants,

-v.-

ROBERT L. SHEVIN, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLEES

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ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF FLORIDA
[273 So. 2d 72]

BRIEF FOR APPELLEES

REPORT OF OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Pursuant to Rule 40, Supreme Court Rules, and Paragraph 3 thereof, Appellees adopt Appellant's Report of Opinions Below, Jurisdiction, and Statutes Involved.

QUESTION PRESENTED

WHETHER THE EXEMPTION FROM AD VALOREM TAXATION OF PROPERTY TO THE VALUE OF $500 YEARLY, PROVIDED BY ART. VII, §3(b), FLA. CONST. AND FLA. STAT. §196.191(7) FOR WIDOWS, BUT NOT WIDOWERS, DENIES APPELLANT, A WIDOWER, THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

The Appellant, a widower, applied to the Dade County Tax Assessor for, and was denied, an exemption from ad valorem taxation for property to the value of $500 under Fla. Stat. §196.191(7), which statute extends such an exemption to persons who are blind, persons who are totally and permanently disabled, and to widows, but not to widowers.

Appellant then filed his complaint for declaratory relief as a class action pursuant to Rule 1.220 Fla.R.C.P., and Fla. Stat. §86.011, alleging denial of his application for exemption under Fla. Stat. §196.191(7) and asserting that as a widower he and others similarly situated were deprived of equal protection and due process of law by the language and application of the statute. The Circuit Court ruled in Appellant's favor and a timely appeal was taken to the Florida Supreme Court which reversed the judgment of the Circuit Court. The Supreme Court held that there was a "fair and substantial relation" between the objective of reducing the factually existent disparity between the economic capabilities of the sexes and the statute affording to women who have lost

a spouse by death a slight economic advantage. (J.S. at A7) Thus, the Florida Supreme Court concluded that Fla. Stat. §196.191(7) is constitutionally valid. (J.S. at A7)

SUMMARY OF ARGUMENT

I.

The granting of a $500 property tax exemption to widows, among others, but not to widowers by Fla. Stat. §196.191(7) and Art. VII, §3(b), Fla. Const. is based on valid social and economic policy determinations and does not deny Appellant the equal protection of the law under the fourteenth amendment.

Although women make up an ever-increasing portion of the work force, they are still far behind in obtaining equality of economic opportunity. The gap between salaries for comparably qualified women and men in like positions is in fact increasing rather than decreasing. Thus, widows, like other women, are not in as favorable a position to support themselves as are other members of society, including widowers, and Florida has taken this into consideration in granting a slight tax advantage to widows.

Such a determination is properly within the broad discretion granted states in allowing tax exemptions, having a fair and substantial relation to the object of the legislation and is in no way palpably arbitrary.

II.

Classifications based on sex are properly found to be valid where they bear a rational relationship to a proper state object, and such classifications are not inconsistent with the equal protection clause of the fourteenth amendment. The attempt by Florida, through a small tax exemption, to reduce the economic disparity between the sexes in the case of widows is a proper use of the state's power to classify, as it is a proper state policy, based upon social as well as economic considerations, to alleviate the hardship to women resulting from the inequality of economic opportunity.

III.

Even should classifications based upon sex be considered to be inherently suspect, the compelling interest of the state in reducing the economic disparity between the sexes, and the resulting encouragement of the elderly to locate in Florida justifies the classification set out in Fla. Stat. §196.191(7) and Art. VII, §3(b), Fla. Const., and is consistent with the equal protection requirements of the fourteenth amendment.

IV.

Should the classifications based on sex be held unconstitutional as violative of the equal protection clause of the fourteenth amendment, this cause should not be remanded to the court below for consideration of whether to judicially expand the definition of widow to include widowers. This issue has already been

fully briefed, argued and considered by the court below. The extension of benefits granted by a provision of the state constitution by judicial redefinition of the term "widow" to include widowers would be improper.

ARGUMENT

I.

THE PROPERTY TAX EXEMPTION FOR WIDOWS PROVIDED BY FLA. STAT. §196.191(7) AND ART. VII, §3(b), FLA. CONST. IS BASED ON VALID ECONOMIC CONSIDERATIONS AND CONSTITUTES A REASONABLE CLASSIFICATION DETERMINED BY ACTUAL DIFFERENCE AND VALID STATE POLICY AND IS PROPERLY WITHIN THE TAXING CLASSIFICATION POWER OF THE STATE.

A. Any classification for purposes of taxation is permissible which has a reasonable relation to a legitimate end of governmental action and only if it appears that there is no rational basis for the classification so as to make it patently arbitrary may it be set aside as invidious discrimination in violation of the equal protection clause of the fourteenth amendment.

It has long been the position of this Court that, in the selection of the subjects of taxation, broad discretion is allowed to

the states.[1] Thus, in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), this Court stated that "the latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." And the Court observed in Madden v. Kentucky, 309 U.S. 83, 87-88 (1940):

"The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislators possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality

[1]Lehnhausen v. Lake Short Auto Parts Co., 410 U.S. 356 (1973); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1940); Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276 (1932).

can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

So long as the state proceeds on a rational basis having some ground of difference bearing a fair and substantial relation to the object of the legislation, and does not resort to a classification which is palpably arbitrary, the classification has been upheld.[2] "If the selection on classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law." Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy."[3] Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

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[2]Lindsley v. National Carbonic Gas Co., Inc., 220 U.S. 61 (1910); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928); Ohio Oil Co. v. Conway, 281 U.S. 146 (1930).

[3]Citing American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900); Stebbins v. Riley, 268 U.S. 137, 142 (1925).

In such a case, the proper test in defining the limits placed by the equal protection clause on state power is whether the classification is "palpably arbitrary" or "invidious." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

The classification in this case effects an exemption from taxation for property owned by widows, blind persons and persons who are totally and permanently disabled, to the value of $500. Such a classification is far from being palpably arbitrary, and in fact rests on a recognition that these groups are likely to face certain economic hardships with which the general population does not have to cope.[4] As to

[4]Appellant cites Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), cert. denied 412 U.S. 906 (1973) as support for the proposition that a classification based on sex constitutes invidious discrimination. A careful reading of that opinion, however, indicates that the Court recognized the economic considerations. The Court asserted that "relief" to persons in low income brackets and bearing special burdens of dependence could be achieved. The Court then indicated that "the lack of a basis related to the income of women is illustrated further by the fact that the statute allows the deduction to widowers and divorcees." Thus, that court appeared to indicate that had the statute in question in fact been based upon the inferior income of women, it would have been upheld. 469 F.2d at 470, Footnote 4.

widows, the Supreme Court of Florida reasonably and properly noted that:

"It has been ably pointed out that the object of the legislation here in question is 'to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to "reduce the disparity between the economic . . . capabilities of a man and a woman,". . . ' As recognized in Gruenwald v. Gardner, supra, women workers as a class do not earn as much as men. Certainly this has a 'fair and substantial relation' to the ability of women owners to pay taxes on property of even minimal value.

"We recognize that steps have been and are continuing to be taken toward the elimination of legal barriers to equality of the sexes. Among the significant steps toward this end is the legislative provision for alimony and child support payments by women as well as men. This provision, however, provides a means of taking into consideration the factual economic capability of each woman involved through judicial supervision and control.

"Significantly, the provisions of the statute under review do not provide any means for similar consideration. Therefore, until the steps taken toward legal equality result in equality in fact, a finding of identity between the sexes at this time would rest on fiction and not fact." (J.S. at A6-A7)

Appellant, in arguing that women are not in such an economically inferior position, emphasizes heavily that women have been increasing as a percentage of the work force. (Brief of Appellant, P. 6). He chooses to

ignore the fact that this has not benefited women in regard to earning capacity. In reality, inequality of income is a severe and current problem. Women who work at full-time jobs the year round earn, on the average, only $3 for every $5 earned by men similarly employed.[5] The gap, in fact, was greater in 1970 than it was in 1955. Women's median wage or salary income as a proportion of men's fell from almost 64% in 1955 to 59.4% in 1970.[6]

[5]S.Rep. No. 689, 92d Cong., 2d Sess. 9 (1972).

[6]The U. S. Dept. of Labor, Women's Bureau Fact Sheet on the Earnings Gap, Dec., 1971 (Rev.), contained the following chart:

MEDIAN EARNING OF FULL-TIME YEAR ROUND WORKERS,[a] BY SEX, 1955-70[b]

Year	Median Earnings Women	Men	Women's median earnings as percent of men's
1970	$5,323	$8,966	59.4
1969	4,977	8,227	60.5
1968	4,457	7,664	58.2
1967	4,150	7,182	57.8
1966	3,973	6,848	58.0
1965	3,823	6,375	60.0
1964	3,690	6,195	59.6
1963	3,561	5,978	59.6
1962	3,446	5,794	59.5
1961	3,351	5,644	59.4
1960	3,293	5,417	60.8
1959	3,193	5,208	61.3
1958	3,102	4,927	63.0
1957	3,008	4,713	63.8
1956	2,827	4,466	63.3
1955	2,719	4,252	63.9

a)Worked 35 hours or more a week for 50 to 52 weeks.
b)Data for 1967-70 are not strictly comparable

These same discrepancies in incomes due to sex and the resulting hardship are as equally applicable to Florida as to the nation generally. For example, in Florida in 1969, of all families which had a male head of the household, 9.8% were below the poverty level, while of those which had a female head, 35.8% were below the poverty level.[7] The average income in 1969 for all Florida families was $10,120, while that for Florida families with a female head of household was only $5,718.[8] Florida also has a much higher percentage of widows than widowers. In 1970, of males, age 14 years and over, 3.4% were widowers, while 14.0% of the females in the same age group were widows.[9]

Thus women, although joining the working population in increasing numbers,

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with those for prior years, which are for wage and salary income only and do not include earning of self-employed persons.

[7]U.S. Bureau of the Census, Census of Population: 1970 GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C11 Florida, April 1972, at 203.

[8]Id. at 233.

[9]U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC(1)-D11 Florida, October 1972, at 679-80.

are nevertheless subject to a clear economic disadvantage in the area of comparability of incomes. On this basis, it can hardly be said that there was no rational basis on which the citizens of the State of Florida could have determined the subject classification nor, therefore, could it be said that the classification is patently arbitrary.

B. Distinctions based on sex may properly be found to exist, and the proper test of the validity of such distinctions should be whether the classification bears a rational relationship to a state object that is sought to be advanced in a manner which is consistent with the equal protection clause of the fourteenth amendment.

The Court has long held that the equal protection clause of the fourteenth amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups.[8] It is only when the discriminating treatment and varying standards, as created by the legislative classifications, are

[8]Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910); State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 533 (1931); American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900). See Williams v. McNair, 316 F.Supp. 134, 136 (D.S.C. 1970) aff'd without opinion 401 U.S. 951 (1971).

arbitrary and wanting in any rational justification that they offend the equal protection clause.[11] Specifically, a legislative classification based on sex has often been held to be constitutionally permissible.[12]

In Reed v. Reed, 404 U.S. 71 (1971), the Court struck down a sex-based classification in an Idaho statute. The language of the Court was substantially in accordance with prior cases however:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Commissioners,

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[11] Bell's Gap R.Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293 (1898); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959).

[12] See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-395 (1937); Radice v. New York, 264 U.S. 292, 296-298 (1924); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57 (1961); Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970), aff'd without opinion 401 U.S. 951 (1971); Forbush v. Wallace, 341 F.Supp. 217 (M.D.Ala. 1971), aff'd without opinion 405 U.S. 970 (1972).

394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§15-312 and 15-314.

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". . . To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

". . . By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. Royster Guano Co. v. Virginia, supra." 404 U.S. at 75-77. (emphasis supplied)

Thus, while striking down a classification established merely for the administrative convenience of eliminating hearings, the Court reaffirmed that, even where sex is the basis of classification, a classification which is reasonable, and not arbitrary, and which rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike, does not violate the equal protection clause of the fourteenth amendment. In setting out this test, the Court cited only Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), in support of its determination. The test of equal protection as stated in Royster Guano Co. v. Virginia was that:

"It is unnecessary to say that the 'equal protection of the laws' required by the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of the court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy . . . . Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory." 253 U.S. at 415.

It does not appear, therefore, that Reed v. Reed, supra, determined that the state had the same burden, where sex is the basis of a classification, as it would have where certain classifications such as race,[13] nationality[14] and alienage[15] were challenged. Those cases subject the classification to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and the showing of a "compelling state interest." Shapiro v. Thompson, 394 U.S. 618 (1969).

Further indication that the test for sex-based distinctions remained as it had historically been treated exists. Four months after the Reed decision, this Court affirmed without opinion[16] the holding of a three judge District Court in Forbush v. Wallace, 341 F.Supp. 217 (M.D.Ala. 1971). In that case, the District Court upheld both the requirement that a wife upon marriage take her husband's surname and the requirement that she use that name in order to obtain a driver's license. The District Court reasoned that:

"This judicial pronouncement, as with any state statute or regulation, must have a

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[13]Bolling v. Sharpe, 347 U.S. 497 (1954); McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

[14]Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Oyama v. California, 332 U.S. 633 (1948).

[15]Graham v. Richardson, 403 U.S. 365 (1971).

[16]405 U.S. 970, aff'g 341 F.Supp. 217 (M.D.Ala. 1971).

rational basis. It is well settled that 'the Equal Protection Clause does not make every difference in the application of laws to different groups a violation of our constitution.' Williams v. Rhodes, 1968, 393 U.S. 23, 30. Thus, as a general rule, a law is not violative of the Fourteenth Amendment, despite the existence of discrimination in the technical or broad sense, where the law at issue maintains some rational connection with a legitimate state interest. E.g., McDonald v. Board of Election Commissioners, 1969, 394 U.S. 802, 808-09; Kotch v. Board of River Port Pilots Commissioners, 1947, 330 U.S. 552. Furthermore, when a court is presented with a challenge to a seemingly valid state law on equal protection grounds, it must sustain that law if it can discern any rational basis. E.g., Dandridge v. Williams, 1970, 397 U.S. 471; Metropolitan Casualty Insurance Co. v. Brownell Industries, 1935, 294 U.S. 580; Borden's Farm Products Co. v. Baldwin, 1934, 293 U.S. 194." 341 F. Supp. at 222.

In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court once again examined the question of the degree of justification necessary for classification based on sex. While four members of the Court indicated a willingness to extend the "inherently suspect" test to sex classifications, the

majority of the Court refused to do so.[17] Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun stated:

"I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex, 'like classifications based upon race, alienage, and national origin,' are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' Supra at 682. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale." 411 U.S. at 691-92.

This reasoning is sound and is a recognition that distinctions based on sex may be

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[17]Mr. Justice Stewart, in concurring with the result, limited his finding to a determination that the statutes involved worked an "invidious" discrimination. Mr. Justice Rehnquist dissented on the grounds stated by the District Court. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun, concurred, but for the reasons set out in the text, infra.

rational and beneficial to both sexes. Such is the case before us. Women are in an inferior economic position as previously noted, which does not appear to be correcting itself in spite of the legislative efforts which have been made. In fact, as previously noted, the situation has become even more aggravated over the years. To try to limit the extent of this burden is a proper policy determination of the state and the statutory exemption constitutes a rational means for doing so. As noted by the Second Circuit Court of Appeals in Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), where the court held that a statute granting women more favorable treatment than men in computing social security benefits does not violate the Civil Rights Act:

"The appellant concedes that women, as a class, earn less than men, that their economic opportunities in higher age groups are less, and that higher benefits will operate as an inducement for their earlier retirement, but disputes 'the unequal treatment of two individuals solely because of sex' and argues that a 'classification must rest upon a difference which is real * * *.' . . .

"There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman--and the means used to achieve that objective in affording to women more favorable benefit computations. There is, moreover, nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. Notwithstanding the favorable treatment granted

to women in computing their benefits, the average monthly payments to men retiring at age 62 still exceeds those awarded women retiring at that age. Social Security Bulletin, Annual Statistical Supplement 1965, U. S. Dept. of Health, Educa. and Welfare, at 47, 56, 64, 69. Social Security Bulletin, Annual Statistical Supplement 1963, supra at 47." 390 F.2d at 592.

A recent decision by a three judge District Court in New Jersey in Wiesenfeld v. Secretary of Health, Education, and Welfare, 42 L.W. 2326 (1973), concurred in this analysis of Reed and Frontiero. In reviewing a section of the social security act providing widows, but not widowers, with survivors' benefits while caring for children entitled to insurance benefits, the Court stated:

". . . The Supreme Court has declined to add sex to the list of inherently suspect classifications. Frontiero v. Richardson, 411 U.S. 677, 41 L.W. 4609 (1973); Reed v. Reed, 404 U.S. 71, 40 L.W. 4013 (1971). . . .

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"In Reed and Frontiero we do not discern a 'general shift' of standards nor the establishment of a 'new intermediate' equal protection test, and we reject those cases which adopt such standards. We do, however, perceive an expression of deep concern by the Supreme Court to analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian age. . . . " 42 L.W. at 2326-27.

The District Court then reviewed the matter first under the "traditional" test and determined that it satisfied that standard:

". . . [W]e must first proceed to an analysis of whether Section 402(g) is rationally related to some valid public purpose.

"When this standard is applied to Section 402(g), we find that this measure is a rational attempt by Congress to protect women and families who have lost the male head of the household. This choice by Congress is not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful." 42 L.W. at 2327.[18]

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[18]While that court then applied the "close judicial scrutiny" test, and found the provision to violate that test, it did so only after determining that the legislation, in fact, discriminates against some of those it intends to protect:

". . . [E]ven though Congress may have intended that this section rectify the effects of past and present discrimination against women, it operates to 'heap on' additional economic disadvantages to women wage earners such as [the deceased wife]. During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less

Clearly the granting to widows, as an economically disadvantaged group, a small exemption from ad valorem property taxation does bear a rational relationship to the goal of reducing the existent economic gap and is valid under the fourteenth amendment. To determine otherwise would be to ignore the realities of economic hardship faced by widows in our society.

C. Even if sex classifications are considered to be inherently suspect, the classification found in Fla. Stat. §196.191(7), is justified when subjected to strict judicial scrutiny, as the state has a compelling interest in

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social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

"While affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities, such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect. Because Section 402(g) discriminates against women * * * who have successfully gained employment as well as against men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment."42 L.W. at 2327.

Such is not the situation in the case at hand. The statute is intended to benefit widows, who, as a group, are subject to economic disadvantages, but none of whom, unlike the Wiesenfeld situation, are potentially discriminated against by the legislation.

protecting widows.

In Frontiero v. Richardson, supra, 411 U.S. at 689, it is indicated by four members of the Court that classifications based upon sex, like classifications based on race, alienage, and national origin, are inherently suspect and should therefore be subjected to close judicial scrutiny. This was the first indication by any members of the Court that such scrutiny should be given to this area. While this approach, we submit, does not recognize the realities of the differences between men and women which justify classifications where they are rational, nevertheless, should the Court determine to apply the stricter test, the State of Florida does in fact have a compelling interest which is being furthered.

Unlike the situation in Frontiero, the purpose of the provision in Florida's Constitution and statutes is not merely "administrative efficiency" and is not subject to the conclusion of the Court in that case that:

". . . by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband." (emphasis supplied) 411 U.S. at 690-91.

It is to be noted that, while the Court refused to recognize sex differentiation for the sole purpose of achieving administrative convenience as a compelling state interest, the Court did indicate that if the Government could

affirmatively show that money was saved it would suffice:

"The Government offers no concrete evidence however, tending to support its views that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependence requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members if presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable." 411 U.S. at 689-90.

Florida is not solely concerned with saving money or administrative convenience. To grant an exemption to widows in fact is a considerable expense to the state in lost revenues. Nevertheless, the state recognizes the plight of women in the economic area and the decreased ability, through no fault of their own, to sustain themselves in today's

job market.[19] Florida, with its large elderly population, has a special concern for widows who may be faced with this problem and has a compelling interest in giving them special tax consideration. This fact is bolstered by the anticipation that such action will encourage this group to continue to seek retirement homes in Florida. Such economic and social considerations are certainly not in a class with mere administrative convenience, nor even with the money-saving basis which the Court indicated in Frontiero could satisfy their strict judicial scrutiny. Considering these compelling interests of the citizens of Florida, it should be determined that sufficient reason exists to uphold the statute even under such strict scrutiny.

II.

SHOULD THE AD VALOREM TAX EXEMPTION GRANTED TO WIDOWS BY ART. VII, §3(b), FLA. CONST., AND FLA. STAT. §196.191(7) BE HELD TO BE UNCONSTITUTIONAL, THIS CAUSE SHOULD NOT BE REMANDED TO THE COURT BELOW FOR CONSIDERATION OF JUDICIALLY EXPANDING THE WORD "WIDOW" TO INCLUDE WIDOWERS.

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[19] This is akin to the situation suggested in Wiesenfeld v. Secretary of Health, Education, and Welfare, 42 L.W. 2326 (1973), where the New Jersey District Court suggested that "affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities, ..." 42 L.W. at 2327

Appellant urges that should this Court determine that the gender-based classifications in §196.191(7), Fla. Stat. and Art. VII, §3(b), Fla. Const., violate the fourteenth amendment to the United States Constitution, this cause should be remanded to the Florida Supreme Court for consideration of whether the constitutional infirmity could be remedied by holding the exemption available to all persons, otherwise qualified, who have lost a spouse by death. Appellant has asserted that "[t]he remedial choice was never addressed by the Florida Supreme Court since it concluded that the 'widows only' exemption was constitutional." Appellants' Brief at 26. Contrary to this assertion, both the trial court, in holding the statute to be unconstitutional, and the Florida Supreme Court, in reversing that holding, did consider the propriety of "expanding" the definition of "widow" to include males as well as females and held that they were unable to do so.[20]

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[20]The Trial Judge held "this Court is powerless to expand the meaning of 'widow' to include both women and men . . . . " (J.S. at A3) The Florida Supreme Court was in accord:

"We agree that the term 'widow' may not be judicially redefined to include a man who has lost his wife since the legislative intent obviously limits the application of the term only to a woman who has lost her husband by death. This definition is in conformance with the unvarying legislative and judicial use of the term in other areas. [Citing City of Jacksonville Beach v. State,

This point was fully briefed and argued before the Florida Supreme Court by both Appellant and Appellees.

It should also be pointed out that the gender-based classification under consideration here is not simply one instituted by the legislature, but is an expression of the will of the people of Florida who ratified the provisions of Art. VII, §3(b), Fla. Const., in November of 1968. Thus, if this cause were to be remanded, the Florida Supreme Court would have to consider not what the legislature intended by enacting

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151 So.2d 430 (Fla. 1963); Wilson v. Fridenburg, 19 Fla. 461 (1882); In re Estate of Yohn, 229 So.2d 612 (Fla. App. 1st, 1969), In re Beacher's Estate, 177 So.2d 838 (Fla. App. 3rd, 1965).] (J.S. at A5-A6)

In Brinson v. State, Case No. 43932 (Fla.Sup.Ct., filed Jan. 9, 1974), rev'g 278 So.2d 317 (1 D.C.A. Fla. 1973), the Florida Supreme Court held that Florida's rape statute, Fla. Stat. §794.01, could not be judicially construed to apply to a defendant accused of forcible carnal knowledge of a male:

"It is not the province of the judiciary to legislate; therefore, for the Court to change the definition of 'female' found in Florida Statutes, §794.01, to be the same as the more inclusive word 'person' is to invade the province of the Legislature." Slip Opinion at 3.

Fla. Stat. §196.191(7), but what the people of Florida intended when they ratified the mandatory, self-executing exemption provision of Art. VII, §3(b), of the 1968 Florida Constitution. The universally accepted definition of the word "widow" to refer only to females was undoubtedly in the minds of the people when they ratified this provision of our constitution, and there can be little question but that their understanding of the provision and their intention in ratifying it was to grant the exemption only to a woman who has lost her spouse by death.

Appellant has cited numerous cases in support of his proposition that a judicial extension of benefits under an otherwise unconstitutional statute is proper.[21] In those cases the courts have generally looked to the overall legislative purpose of the statutes involved in order "to decide whether it more nearly accords with [the legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the legislature] plainly did intend, constitutional." Welsh v. United States, 398 U.S. 333, 355-56 (1970) (Harlan, J., Concurring). Appellant has cited no case in which the courts have extended the benefits provided by a provision of a state constitution. The reason for such judicial restraint is sound. When a court extends the benefits

[21] See Appellant's Brief at P. 26-30.

of a legislative enactment, it does so because it feels that is what the legislature itself would do in the face of having the provision otherwise fall for some constitutional infirmity. However, should the court misread the will of the legislature, it is usually a relatively simply matter for the legislature to repeal the provision altogether. The situation is entirely different when the benefits sought to be extended are provided not by statute, but by an expression of the will of the people in a state constitution. Should the court misread the will of the people in this situation, it can be rectified only by a constitutional amendment. The process of amending Florida's Constitution is far more costly and lengthy than the legislature's enacting a statute,[22] and until it is amended,

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[22]The procedure for amending Florida's Constitution is provided in Article XI, Fla. Const. (1968). The proposed amendment may originate either by joint resolution agreed to by three-fifths of the membership of each of the two houses of Florida's Legislature (Art. XI, §1), or by an initiative petition "signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceeding election in which presidential electors were chosen. (Art. XI, §3) In either case, the proposed amendment must be approved by a vote of the electors before it may become effective. (Art. XI, §5)

public funds will be lost by virtue of extending a tax exemption to a class of persons which the people have not expressly provided for. On the other hand, should the Court hold the widow's exemption provision of Florida's Constitution to be invalid, then the people of Florida would have the opportunity to affirmatively express their will and desire to extend an exemption to both widows and widowers.

CONCLUSION

For the reasons stated above, the decision of the Florida Supreme Court should be affirmed and Art. VII, §3(b), Fla. Const., and Fla. Stat. §196.191(7) should be declared to provide a proper classification within the taxing power of the State of Florida, not in violation of the equal protection clause of the fourteenth amendment.

However, should the Court hold the gender-based classification to be unconstitutional, this cause should not be remanded for consideration of whether to judicially redefine the term "widow" to include widowers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, SYDNEY H. McKENZIE, III, a member of the Bar of the Supreme Court of the United States, and of counsel for Appellees herein, hereby certify that I have this day served three (3) printed copies of the foregoing BRIEF FOR APPELLEES on the Appellant herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellant as follows:

RUTH BADER GINSBURG
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

DONE this 18th day of January, 1974.

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